Supreme Court, U.S.
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No. (D)

In The
Supreme Court of the United States

ESTATE OF DOROTHY L. MORRISSEY,
AND MICHAEL J. MORRISSEY,
Petitioners,

v.

ROBERT LESNIAK, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL J. MORRISSEY
10307 WEST BROAD STREET, #167
RICHMOND, VA. 23060
TEL: (804) 502-4468

Petitioner Pro Se

April 28, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether, on a motion filed under Rule 60(b) of the Federal Rules of Civil Procedure, a District Court can refrain from considering the motion at all solely because the earlier case, to which the Rule 60 motion is taken, was appealed.

PARTIES TO THE PROCEEDING

The following are the parties to the proceeding in the court whose judgment is sought to be reviewed. Appellants (plaintiffs below) are the Estate of Dorothy L. Morrissey and Michael J. Morrissey, with the Petition for Certiorari being filed by Michael J. Morrissey. The named defendants in the eight cases of the underlying case are those listed below, although some were not represented, and did not respond nor participate at any hearing in the underlying case.

Defendants below

Robert Lesniak
Ashland Convalescent Center
Administrator, Ashland Convalescent Center
George F. Tidey
Hanover County Adult Protective Services
Hanover County
Patricia Gershenoff
Sally Moon
George Elmore
Joseph Rapasardo
Henrico County
L.A. Harris
Bon Secours, Inc. t/a St. Mary's Hospital
Carrie West
Terry Betino
Jean Todd
Elizabeth Oxenham
S.J. Deidlitz
C.A. Wood
Sheryl L. Herndon
Ann Honeycutt
Howard C. Vick

List of defendants, continued:

Michael Robertson
Commonwealth of Va.
Va. Dept of Aging
Terry Rainey
Va. Dept of Health
Anne Peterson
Va. Center for Quality Health Care
Va. Dept of Medical Assistance Services
Henrico County Dept of Social Services
Henrico County Dept of Mental Health
Martha Calloway
Richard Glover
Cynthia Wood
James Gilmore
Harry Carrico
Richard H. Poff
Carolyn White
Capitol Area Agency on Aging
Shawn Majette
Paul Izzo
Office of the Attorney General
Richard Alderman
James Moorre
Joseph Rappasada
Health of Virginia, Inc. t/a University Park Nursing Home
Patricia L. Jones
William Biggers
C. Beatty
Victoria Gutmaker
Susan A. Clifton
Mary Ann Proffitt
Greer Jackson
L. Neil Steverson

List of defendants, continued:

Edwin Bischoff
R. R. Brooks
Rebecca Andrews
Michelle Gavin
Gayle Clendenin
Peter Boling
Medical College of Va.
Virginia Commonwealth University
MCV Physicians, a/k/a Associated Physicians

CORPORATE DISCLOSURE

There are no corporate issues in this case and no corporate disclosure as required by Rule 29.6.

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8 C. Wright & A. Miller, Federal Practice and Procedure, § 2287 (1970) 18

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CITATIONS OF THE REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY THE COURTS

June 7, 2006USDC, Alexandria order entered at the case's initial hearing (Wexler, J.), 4 pages.

August 15, 2006 Order on reconsideration (Wexler, J.), 1 page.

February 8, 2006 USDC, Harrisonburg order on the one case not consolidated (Conrad, J.) 2 pages (para. (5) at top of page 12 being the second page of the Adjudged and Ordered document. 2 pages. Its supporting Memorandum Opinion is also attached. 10 pages.

January 29, 2008 USDC, Richmond order on the two Rule 60(b) motions (Spencer, J.), 3 pages.

September 29, 2008 Court of Appeals panel decision affirming the district court. 2 pages. To this, a motion for rehearing was filed and final order thereon was mandate issued Nov. 26, 2008 (which follows)

November 26, 2008 Mandate issued as final from the Court of Appeals (the email notice per email service received from the Court of Appeals).

Copies of each in included in the Appendix.

BASIS FOR JURISDICTION

This Court has jurisdiction over this case as a review of a final order from a U.S. Court of Appeals. 36 Stat. L. 1157, Judicial Code, Sec. 238 (Appeal from a circuit court of appeals to the Supreme Court).

STATUTE INVOLVED IN THE CASE

Rule 60(b) of the Federal Rules of Civil Procedure, which reads as follows:

> **(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.**
>
> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment

that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

STATEMENT OF THE CASE

Nature of the Case and Procedural Background

The case before this Court is from a denial of a Rule 60(b) motion for Relief from a Judgment that was denied by the lower district court and simply "affirmed" by the court of appeals. The case to which the Rule 60 case relates is a case brought in federal court for Medicare Fraud, wrongful death and related causes of action, referred to herein as the "underlying case". The Rule 60 motion case (the "present case") is the subject of this Petition for Certiorari.

The underlying case was filed in December 2005 by Michael J. Morrissey, the court-appointed Administrator of the Estate of Dorothy L. Morrissey, with the Estate and Mr. Morrissey individually named as plaintiffs. Dorothy Morrissey was also the mother of appellant Michael Morrissey.

Some years earlier and out-of-the-blue, a Guardianship hearing notice had been served on Mrs. Morrissey, driven, it was later found, by a social worker of questionable soundness who did not know Mrs. Morrissey and had never been in her home. In the hearing that followed, a local County judge (Al Harris) put total control of Mrs. Morrissey's person and property in the hands of a stranger, separating Mrs. Morrissey from her home and family. Prior to all this, Mrs. Morrissey's attorney had prepared papers

naming her son as her Power of Attorney (POA) and denoting him as the decision-maker in her Advanced Medical Directive. These formal papers were filed and the court confirmed the validity of the designated POA. Yet, the hearing was nonetheless conducted in Mrs. Morrissey's absence, and her son/POA was excluded from the hearing and not allowed to participate. At all times throughout the relevant period and up to the time of her death, Mrs. Morrissey was a legally competent adult.

Under the so-called "guardianship" that resulted, Mrs. Morrissey was forcibly confined in various nursing homes from years 1997-2000, against her wishes and despite vehement protests by both her and her son. She died painfully in 2000 due to gross Stage IV bedsores over much of her body caused by this confinement. The Estate came into existence in December 2000 when appellant's son was court-appointed as its Administrator.

The underlying case was filed in the U.S. District Court seeking a declaratory order and judgment for damages due to the wrongful death of Dorothy Morrissey, for Medicare fraud and other specified causes of action. The case was filed in the U.S. District Court in Norfolk, Va. as eight separate cases, separated out for better manageability according to a certain time frame or event, considering that the events spanned over a greater than three year time period.

After service of process on the approximately 65 defendants, seven of the eight cases were transferred to the Richmond USDC and consolidated. The Richmond USDC then transferred the case to the

USDC in Alexandria (reportedly due to conflicts existing in the USDC Richmond). The Alexandria USDC then assigned the case to a visiting New York State judge who came to Virginia occasionally to handle overload cases. One case was not consolidated, and that was transferred to the USDC in Harrisonburg, Va. (discussed below, and App. H).

In May 2006 an initial status hearing was held in the USDC Alexandria, Va. at which plaintiffs did not appear as they were not aware of the hearing. As explained to the court later at the August 2006 hearing for Reconsideration, the Estate's administrator underwent medical situations in another State distant from Virginia that involved four surgeries in the first part of 2006 and did not see the notice of that initial hearing and therefore was not present. At that hearing before the New York State visiting judge, the case was dismissed and sanctions in the amount of "$10,000 to each defendant" was imposed against each plaintiff. The authority or Rule relied on for this action is not stated in the order, the total sanction amount is not given, and the parties awarded the sanction are not identified by name. (significant because some never appeared or responded in the case). But given the number of defendants named, the sanction amounts to an approximately $650,000 against each appellant, for a total sanction of about $1.3 million. The exact amount cannot be determined from the order. The order also found that none of the defendants was properly served with process; in other words, there was no personal jurisdiction over the defendants in the case, thus contradicting the action of awarding sanctions to defendants the court had no jurisdiction over. The district court further, despite its no jurisdiction ruling, also dismissed the case based on

a summary Statute of Limitations finding as to all counts in all the consolidated cases. No evidence was ever taken in the case at the initial status conference.

Appellants filed their appeal and a motion for reconsideration on the same day they first received the district court's order in the mail. A hearing was held on August 10, 2006 at which appellant's motion for reconsideration was denied without any court discussion or comment of any issue. (App. C).

A related procedural event significant to this Petition is that the USDC in Harrisonburg, Va. entered an order on February 7, 2006 in essentially the same case, one not consolidated with the others and heard by a different judge in Harrisonburg. That order, while dismissing the case on grounds not relevant to this Petition, rejected defendants very same motion for sanctions. The case was essentially the same as the others heard in the USDC in Alexandria: same plaintiffs, same issues, same procedural history and at least some of the same defendants. The same motion for sanctions was made with the same arguments before the USDC in Harrisonburg, Va. as made in the consolidated case. The motion was denied, with the Court making a point to state in its order: "Inasmuch as there is no indication that the plaintiff has abused the processes of this court, the motion for sanctions shall be and hereby is DENIED." (capitalization in the original quote). [Appendix H, at page 25a, paragraph (5)].

Appellants appealed the USDC order (App. D) that dismissed the case and imposed the huge sanctions in appellants' absence. The appeals court consolidated

both appeals (to the Appendix D and C orders), and in a subsequent order denied the appeal.

Appellants then filed two FRCP Rule 60(b) motions for Relief from Judgment, (directed to the orders of App. D and C), and their Petition for Certiorari to the U.S. Supreme Court.

Another transfer of the case then occurred, with the pending Rule 60(b) motions case being transferred from the USDC in Alexandria back to the USDC in Richmond, and again a different judge was assigned. The USDC Richmond entered a Stay on both motions until a final decision was entered by the U.S. Supreme Court. The Petition for Certiorari was denied on January 8, 2008.

The pending Rule 60 motions were then activated from the Order of Stay for consideration. Although appellant expected to receive a notice of hearing, there was none. An order entered on January 29, 2008 denied both motions (App. B) for the reason that the underlying case had been appealed. The USDC Richmond never considered the merits of the Rule 60(b) motions.

Appellants appealed the district court's denial and that appeal was summarily denied by the appeals court's mandate issued November 26, 2008. (Apps. F and G). It is from this denial of the two Rule 60 motions that plaintiff files its Petition for Certiorari.

ARGUMENT AMPLIFYING THE REASONS FOR ALLOWANCE OF THE WRIT

I. THE RULE 60(B) MOTION WAS PROPERLY BEFORE THE COURT FOR RELIEF FROM A GLARINGLY DEFECTIVE ORDER

A. The District Court Retains Jurisdiction To Hear A Rule 60(b) Motion After An Unsuccessful Appeal

The District Court erred by refusing to consider the merits of the Rule 60(b) motions. Although two Rule 60(b) motions were filed,[1] it will be referred to in the singular herein as "the Rule 60 motion" for simplicity. Rule 60(b) of the Federal Rules of Civil Procedure (FRCP) provides an unsuccessful party additional grounds for vacating a judgment "[E]ven after a judgment has become final and even after an appeal has been lost." *GenCorp, Inc. v. Olin Corp.* 477 F.3d 368 (6th Cir. 2007), at Sect. II.A. In *GenCorp*, despite what the court referred to as a "protracted" trial (contrast to the early first appearance action taken in the underlying case), and *GenCorp's* unsuccessful appeal and denial of certiorari by the U.S. Supreme Court, the USDC correctly considered the merits of that plaintiff's later-filed Rule 60 motion.

An appellate court is confined to the record and the issues then before the court, and does not purport to deal with possible later events and other situations

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[1] To the USDC orders of App. D and C.

contemplated by Rule 60(b).[2] The District Court thus fully retains the power to act on a motion for relief even after the appellate court resolved the matter upon appeal. The U.S. Supreme Court emphasized this in *Standard Oil Co. of California v. United States, 429 U.S. 17 (1976)* (eliminating the earlier requirement that a petition requesting permission to exercise a Rule 60 motion must first be filed with the court of appeals. See, e.g., the *Syllabus* in *Standard Oil*).[3]

In *Wilkin v. Sunbeam Corporation, 405 F.2d 165 (10th Cir. 1968),* the court emphasized a party's right to have a Rule 60 motion heard on its merits even after an unsuccessful appeal, citing 7 Moore's Federal practice, 60.30[2], page 341: Rule 60(b) "does not require leave from an appellate court, although the judgment has been affirmed or settled upon appeal to that court". The *Wilkins* court noted that a Rule 60 motion is deemed to re-open the case simply by its filing in the district court, irregardless of the case having been appealed, citing *Perlman v. 322 West Seventy-Second Street, Co., 127 F.2d 716 (2d Cir. 1942).* In accord is *Von Wedel v. McGrath, 100 F. Supp. 434 (D.C.N.J. 1951), affirmed 194 F.2d 1013 (3rd Cir. 1952).* See also, *S.C. Johnson & Son v. Johnson, 175 F.2d 176 (2nd Cir. 1949)(dissenting opinion), cert*

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[2] 11 C. Wright & A. Miller, Federal Practice and Procedure s 2873, pp. 269-270 (1973). Cf. *SEC v. Advance Growth Capital Corp.*, 539 F.2d 649, 650 (CA7 1976); accord, *Wilson Research Corp. v. Piolite Plastics Corp.*, 336 F.2d 303, 305 (1st Cir. 1964).

[3] Applied in, *Prop-Jets, Inc. v. Chandler*, 575 F.2d 1322 (10th Cir. 1978).

denied 338 U.S. 860, 70 S. Ct. 103, 94 L.Ed. 527 (1949). Other Circuits have ruled likewise.[4]

The *Wilkin* court went further to give, as an example, that "Rule 60(b) does not limit the power of a court to relieve a party from a judgment for fraud practiced upon the court", and it thereafter proceeded with a full series of hearings on the Rule 60(b) motion.

Significant to the present case being from the Fourth Circuit is the Fourth Circuit's decision in *Tribble v. Bruin, 279 F.2d 424 (4th Cir. 1960)*, although it was not one of the four cases relied upon in the district court's order that refused to consider appellant's Rule 60 motion solely because the original case had been appealed. In *Tribble*, the appeals court held, with respect to plaintiff's renewed motion for a new trial, that "in the interests of justice, we will consider the renewed motion as one seeking relief under Rule 60", citing two cases and Moore's Federal Practice in support (detailed citations omitted here). This commendable interpretation favorable to allow plaintiff to be heard was perhaps motivated by the

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[4] In *Artis v. U.S. Industry*, 805 F.Supp. 609 (N.D.Ill.1992), a district court under Rule 60 awarded a 25% enhancement of fees even after the Court of Appeals had affirmed the district court's initial judgment as to fees.

Similarly, in *Offshore Logistics Services, Inc. v. Mutual Marine Office, Inc.*, E.D.La.1981 (520 F.Supp. 237), an insurer's later-filed Rule 60 motion was held to be properly before the district court and the district court had the power to grant the motion, even after the challenged judgment had been affirmed on appeal. See also, *Jordan v. Verizon Corp. Slip Copy, 2005 WL 3116750 (2nd Cir. 2005)* where Jordan was granted leave to refile a Rule 60(b) motion following the conclusion of the then-pending appeal.

Fourth Circuit's reference in its decision to the broad scope and equity intent inherent in Rule 60, as it stated:

> Ordinarily, a District Court may relieve a party from a final judgment or order under Rule 60(b)(6) for any reason justifying relief other than those specifically stated in Rule 60(b) (1) through (b)(5). As stated in *Klapprott v. United States, 1948, 335 U.S. 601, 614, 69 S. Ct. 384, 390, 93 L. Ed. 266,*
>
> > "In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."
> >
> > * * *
>
> The rule, as we have seen, is broad enough to allow a judgment to be vacated "to accomplish justice".

Tribble v. Bruin, paragraphs 14-15 and last sentence of paragraph 24.

Therefore it is well-established, and contrary to the district court's refusal in the present case to consider the merits of the Rule 60 motion, that a party has the separate, distinct and additional right to have its Rule 60(b) motion considered even after a judgment has

become final and even after being unsuccessful on an appeal.[5]

The Fourth Circuit acted to the contrary with a short-shrift affirmance, in a case in which the district court judge states is one of first impression (now seen to be incorrect, as per *Tribble*). This creates sharp conflict with its own and other Circuits and denies appellant its day-in-court for relief under Rule 60.

B. Appellant's Rule 60(B) Motion Was Required To Be Considered On The Underlying Case In Which No Evidence Was Taken And The Court's Action Was Made Without Any Findings Of Fact

In *Amlong & Amlong, P.A., et al. v. Denny's, Inc. 457 F.3d 1180 (11th Cir., 2006)*, the appeals court, in reversing, held that a district court commits reversible error when it disregards findings of fact (made by a magistrate judge in *Amlong*), and finds bad faith (on a sanctions issue in the case) "without conducting any evidentiary hearing". Any sanction must be based on the merits of the case, and that was yet to be decided pending commencement of Discovery.[6] A decision to sanction involves both factual and legal issues,

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[5] Further in accord is *Ute Indian Tribe v. State of Utah* 935 F.Supp. 1473 (D.Utah 1996).

[6] In accord is *California Med. Ass'n vs. Shalala*, 207 F.3d 575 (9th Cir. 2000) (District Court's initial denial of a Rule 60 motion filed for relief from a cost assessment imposed by the District Court's order was reversed on appeal, holding that the district court abused its discretion in refusing to set aside a fee award not based on the merits of the case. 207 F.3d at 578-79.)

namely, what the party did, and did it rise to a sanctionable level. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 399 (1990).*

In applying these principles of *Cooter & Gell* and *Amlong* to the underlying case, we see that no evidentiary hearing was conducted, and thus there was, and could not be, any findings of fact made in the district court's June 7, 2006 order. This constitutes clear error that inflicts a manifest injustice which appellants filed their Rule 60(b) motion to properly address and correct. Yet, the merits of that motion were never even looked at. Instead, the district court's quick dismissal of the Rule 60(b) motion (without a hearing) was for the sole reason, as clearly stated in that order, of an appeal having been taken in the underlying case. While this ruling itself is an incorrect application of the law, appellant notes further that while the dismissal order held that issues appealed cannot be considered under Rule 60 (itself being contrary to the law), it failed to identify what issues in the Rule 60(b) motion had been heard on appeal. "A decision that is contrary to the law plainly is an abuse of discretion." *Amlong, supra*, citing *Cooter & Gell, supra*, at pg. 405 ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law...").

II. SANCTIONS WERE INAPPROPRIATE AND WITHOUT LEGAL SUPPORT

A. In This Very Same Case, A Different District Court Reached The Exact Opposite Conclusion In Denying Defendants' (Appellees) Request For Sanctions.

As regards the underlying case, one case from the original 8 cases filed in the USDC, Norfolk, Va. that was not consolidated was heard by a Virginia federal judge in the USDC Harrisonburg, Va. (where the defendants in that case were situated). In sharp contradiction to the ruling of the visiting New York State judge sitting in the USDC Alexandria, Va. who heard the remaining consolidated cases, the USDC Harrisonburg – in the exact same case, same Complaint and same argument being made by defendants for windfall sanctions – rejected that argument, denied any sanctions and made a point to explicitly state that appellant had done nothing to warrant the imposition of sanctions. Thus, this sharp conflict in the same case exists within the Fourth Circuit on the identical case heard by a different district court judge. See, App. H, paragraph (5) at page 25a. Rarely can two strikingly different USDC orders be compared each issued in essentially the same case as done here. Compare Appendices D and H.

B. The District Court Lacked Authority To Impose The Sanctions It Did

It is well-established that sanctions under Rule 11 must be based on a signed pleading. See, e.g., *Byrne v. Nezhat, 261 F.3d 1075, 1106 (11th Cir. 2001)*(noting

that Rule 11 "is aimed primarily at pleadings"). The only pleading appellants filed in the underlying case was the Complaint, and the order does not fault that pleading in any manner. Therefore, Rule 11 does not provide the authority for the assessment of any monetary amount against appellants.

While the district court's June 7, 2006 order is silent as to the authority relied on for the over $1 million assessment made against appellants, the only other authority possible besides Rule 11 would be under the court's "inherent powers". Yet this requires a higher showing greater than simply the reasonableness of a party's conduct. *Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991)*, and that too (the court's inherent power) was never even mentioned in the district court's order. The Supreme Court has stated that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers v. NASCO, Inc., supra*, at pg. 44.

In *Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980)*, the U.S. Supreme Court ruled that "[a] specific finding as to whether ...conduct ...constituted or was tantamount to bad faith...would have to precede any sanction under the court's inherent powers". The American rule is that litigants pay their own fees and costs. *Roadway Express, supra*, at 766. Therefore "inherent power" was obviously not the authority relied on, and it does not provide authority for the imposition of over a million dollars in sanctions.

There is, therefore, no legal authority that supports the district court's bankruptcy-triggering order entered against appellants. Plainly, a party threatened with

sanctions or costs, particularly of this magnitude, is entitled to a hearing. See, e.g., *Reynolds v. Roberts, 207 F.3d 1288, 1302 (11th Cir. 2000).* That was denied to appellants in this instance. See, *United States v. Raddatz, 447 U.S. 681 (1979)* (on the necessity of a hearing to see and hear the witness for making factual findings, without which "could well give rise to serious questions". *Id.* at 681, ftnt. 7. In the underlying case, the district court did not hear a single word of testimony from any party and took no evidence in the case. The order thus reflects an impermissible shortcut that renders the result invalid and constitutes an abuse of discretion that has created a manifest injustice which appellant's Rule 60(b) motion for relief properly addressed.

III. THE DISTRICT COURT'S ORDER ERRED IN BOTH ITS DISMISSAL AND ON THE IMPOSITION OF SANCTIONS

A. It Was Error That The District Court Failed To Consider The Rule 60(b) Motion As To The Reversible Errors In Both The Monetary Assessment And The Dismissal Of The Underlying Case's Order

A Rule 60(b) motion is the proper procedure to pursue setting aside a monetary assessment made against a party, such as an attorney fee as was the case in *California Medical Association, et al. v. Shalala, et al., supra*, ftnt. 6. In *Shalala*, the district court denied the movant Belshe's Rule 60(b) motion saying that as an equitable matter, she (Belshe) was not entitled to the relief sought. The appeals court reversed, first noting that the Seventh Circuit, in *Mother Goose Nursery Schools, Inc. v. Sendak, 770*

F.2d 668 (7th Cir. 1985), approved the procedure of a Rule 60 motion for relief from a judgment that imposed a monetary assessment against a party. FRCP Rule 60(b) "provides an appropriate remedy" for a party seeking to vacate a fee award. *Mother Goose*, 770 F.2d at 676. The *Shalala* court added that the Second Circuit has come to the same conclusion, in *Association for Retarded Citizens of Connecticut, Inc. v. Thorne, 68 F.3d 547, 553 (2nd Cir. 1995).*

The *Shalala* appeals court affirmed the district court's holding that Rule 60(b) did apply to the movant's motion for relief from the earlier judgment (this being contrary to the district court's refusal to consider appellant's Rule 60 motion in the present case), but recited that it "nonetheless denied the Rule 60 motion on equitable grounds", and that was found to be an abuse of discretion and was Reversed. The appeals court went even further in holding that "our review of the record discloses no ground on which the district court could deny Belshe (the movant) relief", citing *Maul v. Constan, 23 F.3d 143 at 147 (7th Cir. 1994)*, and remanded "for entry of an order vacating the fee award." This is the same action that appellant believes is appropriate here on the short record (essentially just two documents on the issue: appellants' Complaint and the dismissal order of App. D).

B. By The Order Itself In The Underlying Case, The District Court Had No Jurisdiction To Award Sanctions To Defendants Or Rule On Their Limitations Argument

The underlying case order ruled that no service of process had been made on any defendant. Therefore, the court had no jurisdiction over any defendant. Without personal jurisdiction, the court is unable to impose sanctions for or against the party that the court does not have personal jurisdiction over. 8 C. Wright & A. Miller, Federal Practice and Procedure, § 2287 (1970). Applied in, *Byrnes v. Jetnet Corp. 111 F.R.D. 68 (M.D.N.C. 1986)* (a district court within the Fourth Circuit).

Further relevance of *Shalala* goes to the error in this aspect of the district court's order in the underlying case. The order is explicit in finding that no service was made on any defendant (despite its inaccuracy, that is what the court ruled). There was, therefore, no jurisdiction over any defendant in the case. If standard practice was followed, the case would have been dismissed without prejudice as to all defendants.

Yet the district court nonetheless proceeded to act as though it had jurisdiction and dismissed the case on the basis of a conclusory statement that the case (all seven in the consolidated case, and all nine or so counts in each case) is barred by the statute of limitations (with no other discussion or evidence taken). Statute of limitations is an affirmative defense, so if not pled it is waived. But it was only pled here, and is otherwise wholly unsupported on the

record of the case *sans* evidence. This relates to the second prong of the applicability of a Rule 60(b) motion, and that is when there is no merit to the judgment. In the underlying case, without evidence there was no merit to the dismissal of all consolidated cases simply on the pleading of a Limitations defense.

As the *Shalala* court expressed it, "recognition of the error as to the merits of the judgment "removes the underpinnings of the fee award." * * * and Rule 60(b) "...appears to contemplate exactly the type of motion brought here." *Shalala*, supra.

C. The Rule 60(b) Motion Correctly Sought Relief From Sanctions Awarded In The Underlying Case That Have No Discernable Basis And No Calculatable Total Amount.

In *Maul v. Constan, 928 F.2d 784 (7th Cir. 1991)*, the appeals court "reversed the award of damages for clarification of their basis". The district court then again assessed damages, which was again reversed and remanded on appeal based on an inadequate record to support the damages awarded. *Maul v. Constan, 983 F.2d 1072 (unpublished), 1992 WL 382375 (7th Cir. Dec. 16, 1992)*. With the remanded case in the district court, a Rule 60(b) motion for relief was filed and heard. The fact the case had been appealed in *Maul* did not block the hearing of the Rule 60(b) motion.

The *Maul* district court denied the Rule 60(b) motion. On appeal, the appeals court held that the district court abused its discretion by its award of fees and that any fee award was inappropriate. The fee

award was accordingly reversed and the case remanded again back to the district court. *Maul v. Constan, 23 F.3d 143 (7th Cir. 1994).*

To understand how the sanction action, however wrong, originated in the first place we need to look back to peel away the appellees' plan to avoid the merits in the underlying case. The district court's June 7, 2006 order mentions other actions in cases not before that court, these being lifted from appellees' efforts for an early dismissal. That untested content and its tone makes it obvious that this was nothing more than a defense effort at mudslinging so to distract from the merits of the federal court case, the real case before the court. This was the thrust of appellees' tactic and game-plan which the court, regrettably, bought. No evidence, no hearing from witnesses, no application of the rules of relevancy. Untested defense characterizations were assailed against absent plaintiffs who had not seen the initial status conference notice and so were not present. Those characterizations were misleading, taken out of content, irrelevant to the present case or just plain inaccurate and wrong. They should have been disregarded for this was the first time the underlying case, asserting federal Medicare Fraud and other causes of action, was filed in this federal court. This was the only case before the district court, not other State cases. Yet, without hearing from appellants and without taking any evidence, the district court used an excessive cost approach to impose what can only be described as a bankruptcy-targeted sanction against absent appellants, on a record in which no such award at all was legally justified on the merits of the case and the one pleading of appellants before the court (the

Complaint, in which at this stage all allegations therein are assumed as true).

FRCP Rule 11 is the primary Rule that authorizes the award of sanctions, and it comes with a long litany of case law decisions as well as language in the Rule itself that narrows its application to prevent its misuse. The higher courts have cautioned at length against the misuse of costs, and excessive costs in particular, for gaining other improper objectives, such as blocking the case from ever being re-filed. (where simply an order to that effect, if warranted, would suffice).

The use of excessive fee/costs/sanction awards as a tool or tactic to prevent future litigation, as done here, plainly violates Rule 11 and is an abuse of discretion. The court in *Maul v. Constan, 23 F.3d 143 (7th Cir. 1994)* cited the U.S. Supreme Court's case of *Farrar v. Hobby, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992)* to emphasize that:

> " 'reasonableness' remains the touchstone of the...fees inquiry. See Farrar, --- U.S. at ---, 113 S.Ct. at 575 (noting the court's 'central' responsibility to make the assessment of what is a reasonable fee under the circumstances); Blanchard v. Bergeron, 489 U.S. 87, 96, 109 S.Ct. 939, 945-46, 103 L.Ed.2d 67 (1989) (same)."

Dissenting opinion in *Maul v. Constan, 23 F.3d 143 (7th Cir. 1994)*, heading II., 2d paragraph.

The dissent noted that "reasonableness" and "discretion" are "the hallmarks of the fee

determination". A cost assessment made "without engaging in any measured exercise of discretion" is reversible error. *Farrar, supra*, 113 S.Ct. at 575. A provision allowing fee awards is not "a relief Act for lawyers", referencing Farrar, --- U.S. at --- , 113 S.Ct. at 578 (O'Connor, J., concurring). *Maul, supra*.

As Justice O'Connor stated in *Farrar* in forcefully denouncing the use of huge monetary assessments for an allegedly future deterrent effect for some unidentified conduct:

> The District Court speculated that the judgment, if accompanied by a large fee award, might deter future lawless conduct, ...but did not identify the kind of lawless conduct that might be prevented. * * * Such a judgment cannot deter misconduct any more than a bolt of lightning can; its results might be devastating, but it teaches no valuable lesson because it carries no discernable meaning.

Farrar, 506 U.S. 103, 113 S.Ct. at 578-579 (O'Connor, J., concurring) (citations omitted).

Thus the Supreme Court, in rejecting a party's request to assess a monetary award against the opposing party, "made clear that more than this level of deterrence - - whether it is "merely conjectural" or slightly more than that - - is required before (a monetary assessment is) appropriate." *Maul, supra*, at ftnt 3.

In the underlying case, neither the basis for the amount nor any legitimate level of deterrence necessitating the approximately $1.3 million assessed,

is addressed in the district court's June 7, 2006 order. This violates U.S. Supreme Court law on the required conditions precedent and other requirements for the district court in connection with the imposition of any monetary costs/sanctions against a party. These mandatory guidelines (as per *Farrar*, *supra*, e.g.) certainly should be reflected, if not itemized in some detail, in an order that on a first appearance dismisses the case plus imposes over $1 million in sanctions against *pro se* plaintiffs.

Appellant notes that the amount of the sanctions imposed is hidden somewhat in the district court's order which does not total the amount but merely recites it as "$10,000 to each defendant". However, given the number of defendants, and the award being made against each of the two appellants, this results, at a minimum, in the approximate $1.3 million amount.

It is to be noted that (1) the district court's award imposed in *Farrar* was $280,000 which was reversed. That appeals court discussed considerations required in making such an award which were found lacking in the district court's order. (2) The district court's award imposed in *Cooter & Gell* was $62,000 in fees and $32,000 in sanctions, *Cooter & Gell*, *supra*, at section I. of decision (with the $62,000 attorney's fees reversed by the Supreme Court as beyond the scope of Rule 11). Yet in comparison, the underlying case, with $1.3 million at stake, received only a relatively short district court order from the initial conference held that gave mostly conclusory statements. Compare the brevity and conclusory imposition of sanctions of App. D with the denial of <u>any</u> sanctions of App. H, page 25a, paragraph (5). On the record of the case showing such

aberrations, appellants' Rule 60 motion was proper and it is reversible error that conflicts with both the Fourth and other Circuits in this area that its merits were not even looked at.

In making such a huge award at the initial status conference where only the Complaint had been filed, the district court, in addition to not explaining the basis for the sanction nor the basis for arriving at the $10,000 per defendant figure, should have, at least, totaled the amount (so the court would be aware of the magnitude of what it was ordering) and identified the parties to which it is applied, particularly given the fact that many defendants named did not even appear. Those that did appear argued they had not been served with process so were not properly before the court (an argument which the district court obviously accepted by its ruling of there being no service made in the case).

The fact that the total amount imposed against appellants is not discernable, nor calculatable, from the order itself, is an additional fatal defect which further supports the appropriateness of appellants' Rule 60(b) motion.

D. The Court's Action Conflicts Sharply With The Fourth Circuit's Own Case Law Mandates

The sanctions imposed on their face are unconscionable and unprecedented. Ironically, it is a Fourth Circuit case that provides the most striking example of the conflicts this action has with established law in the Fourth Circuit and elsewhere.

In Re Kunstler, 914 F.2d 505 (4th Cir. 1990) is one of many cases that address the purpose, scope and limitations of sanctions under Rule 11. In *Kunstler*, three attorneys appealed the award of Rule 11 sanctions against them in the amount of $122,834.28. The Fourth Circuit affirmed the findings of the district court as to the imposition of Rule 11 sanctions, but vacated the sanction because it was based on improper considerations and, due to the amount which the court described as "substantial", the district court was required to allow the sanctioned party an opportunity to respond.

Furthermore, the court noted that these are experienced attorneys with "means", such as means to investigate, and no doubt financial means to cover the $10,000 per attorney identified as sanctions (the remaining $92,834 being attributed to fees and costs). Compare to the underlying case on this present Petition, where the entire $1.3 million amount was imposed as a sanction. Approximately $650,000 was imposed on a *pro se* administrator of his mother's estate, and another $650,000 assessed against the modest estate, already in the red with its own expenses. Hardly parties with "means".

E. Any Sanction Under Rule 11 Must Be Based On A Signed Pleading

Kunstler underscores the fact that any Rule 11 sanction must be based on a signed pleading, citing *Cooter & Gel, supra.* The only pleading appellants filed was their Complaint, and the content and recitations in that Complaint were not faulted by the Court. Therefore, no Rule 11 sanctions are justified and this Petition should be Granted to avoid this otherwise

sharp departure, and the conflicts created, from well-established law in both the Fourth and other Circuits. A Rule 60 motion is the proper procedure for vacating the imposed sanctions, and it was error of the USDC to not even consider appellants' Rule 60(b) motion.

F. Severity Of The Sanction Required A Hearing

As regards the requirement for a hearing prior to the imposition of sanctions, the appeals court in *Kunstler* states that "one of the factors to consider is the severity of the sanction under consideration".

In *Kunstler* with a $10,000 sanction at issue, the appeals court, due to the severity of the "substantial" sanctions imposed, reversed and remanded the case to "allow sanctioned counsel an opportunity to respond." * * * "The more serious the possible sanction both in absolute size and in relation to actual expenditures, the more process that will be due." The Fourth Circuit ruled that because the sanction was so large, an opportunity was required to be afforded to both contest that Rule 11 was violated, and to respond to the sanction under consideration.

Compare to the underlying case order. If $10,000 is considered severe, then there must be another descriptive word for the $650,000 amount in the underlying case (against each of two plaintiffs). Contrary to the appeals court directive in *Kunstler*, there was no hearing held on the sanction under consideration in the underlying case.

G. Appellants Were Entitled To Rule 60(B) Relief From An Order That Improperly Awarded Compensatory Sanctions Prohibited Under Rule 11

In *Kunstler*, the sanctioned amount was vacated also on the ground that "the district court used the Rule to shift fees and compensate the defendants". That is not the purpose of Rule 11, as the court stated:

"We have previously held that the least severe sanction adequate to serve the purposes of Rule 11 should be imposed. *Cabell v. Petty, 810 F.2d 463, 466 (1987).*" * * * Rule 11 should not blindly be used to shift fees." Its purpose is not "to compensate the offended parties." That is, Rule 11 does not authorize "compensatory sanctions."

The Order from which appellants sought relief below is silent on the basis for the sanctions. Yet it would appear to be routed in compensatory sanctions prohibited under Rule 11.

The appeals court in *Kunstler* went on to specify the following directives as to the constraint that action under Rule 11 demands.

1. "When a monetary award is issued, a district court should explain the basis for the sanction so a reviewing court may have a basis to determine whether the chosen sanction is appropriate." One of the four primary factors to be considered is the ability of the sanctioned party to pay.

2. "The plain language of the rule requires that the court independently analyze the reasonableness of the requested fees and expenses."

3. "It is particularly inappropriate to use sanctions as a means of driving certain attorneys out of practice."

4. "The amount of sanctions is appropriate only when it is the minimum that will serve" the purpose of Rule 11 (to deter)

5. Rule 11 is not to chill the bringing of valid lawsuits or encouraging creativity in "novel theories of recovery". It is not to be used to address conduct that "fall outside of the scope of Rule 11".

6. Ability to pay. "It is hornbook law that the financial condition of the offender" must be determined before the assessment of any sanction. "A monetary sanction imposed without any consideration of ability to pay would constitute an abuse of discretion. A court should refrain from imposing a monetary award so great that it will bankrupt the offending parties...* * * "or to cause them great financial distress."[7]

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[7] See, e.g., *Salvin v. American Nat. Ins. Co.* Slip Copy, 2007 WL 1097891 (E.D.Va. 2007), citing *Byrd v. Hopson*, 108 Fed. Appx. 749, 756 (4th Cir. 2004) (unpublished) (citing *In re Kunstler*, 914 F.2d 505, 523 (4th Cir. 1990)); and, *Leach v. Smith* Slip Copy, 2007 WL 2155742 (E.D.Va. 2007)(discussing the condition precedent requirement of determining first the party's ability to pay); and, *Morris v. Wachovia Securities*, Inc. Slip Copy, 2007 WL 2126344 (E.D.Va. 2007) (re Rule 11 being limited to signed pleading and not a tool for other purposes).

7. "Rule 11 must be accorded its plain meaning. The text of the Rule clearly pertains only to a "pleading, motion, or other paper." Rule 11 does not encompass all conduct within judicial proceedings, and it clearly does not reach conduct outside of the judicial process." The judicial process before the district court in the underlying case was the case before it. Not other cases not before it and with nothing received in evidence.

The bottom line is that the district court at the point of that initial status conference had before it only appellants' Complaint and defendants' various filed defensive pleadings (being only argument of counsel). All allegations in the Complaint are presumed in the law to be true at this juncture. All defendants' filings are defensive arguments of counsel, not evidence. Yet, the district court first ruled that it had no jurisdiction over any of the defendants by finding that none had been served with process. It then in one sentence said everything is barred by the Statute of Limitations (all counts in all the consolidated cases), and then assessed $10,000 for each defendant against each plaintiff (appellant herein). It cited no authority under which the sanctions were being assessed, did not enunciate the basis for any sanction, did not identify the parties to which the sanction was being awarded, and did not give a total amount of sanctions it was imposing, and that figure cannot be determined from the order due to defendants in the case that never appeared.

Appellants' request for relief by filing their Rule 60(b) motion has been shown to be a proper procedure for seeking relief from this judgment, and the district court committed error in its refusal to hear that motion. The district court's order refusing to even look at the Rule 60(b) motion, and the short "Affirmed" of

the appeals court order, are both clearly erroneous as the orders conflict sharply with both the Fourth Circuit's own cases and those of other Circuits as well.

IV. APPELLANTS' RULE 60(B) MOTION PRESENTED FACTS AND ISSUES DIRECTED TO THE PROVISIONS OF RULE 60 THAT HAD NOT BEEN DECIDED BY THE APPELLATE COURT

Further evidence of the error in not considering appellants' Rule 60(b) motion is the fact that the issues and supporting arguments raised in appellants' Rule 60(b) Motion had not been decided in the appeal of the underlying case's early dismissal, and certainly not under the standards and the six statutory provisions of Rule 60(b). Thus the District Court was incorrect in ruling that the matter had already been decided by the appellate court.

In *Knox I*,[8] a default judgment and a damages inquest was entered against defendants. Defendants timely appealed the judgment but failed to pursue the appeal. Defendants' thereafter filed a Rule 60(b) motion for relief from the judgment. Plaintiffs unsuccessfully argued that since the appeal was abandoned, defendants were foreclosed from relying on Rule 60(b) as a substitute for the appeal. The *Knox I* court rejected the argument and held that the defendants are permitted to assert exceptional

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[8] *Knox v. The Palestine Liberation Organization* --- F.R.D. ----, 2008 WL 878213 (S.D.N.Y. 2008) (decision to abandon the appeal of a default judgment did not foreclose relief pursuant to Rule 60(b) (hereinafter *Knox I*).

circumstances in support of their motion for relief under Rule 60(b), and that the Federal Rules expressly provide for vacating default judgments using the mechanism of Rule 60(b).[9] (Similarly, the present case dismissal and sanctions assessed were the result of a default judgment since appellants had not seen notice of that first status conference and were unaware of it).

As regards the statute of limitations basis for the dismissal by the district court, it failed to make any fact findings as to dates to support this conclusion as to each of the Complaint's multiple counts. With even limited discovery, the facts would support that the case was not dismissible on this ground. The district court further failed to comply with the requirement that the equitable tolling statute be considered and weighed when a statue of limitation issue is raised.[10] These issues were properly raised in the Rule 60(b) motion and are just some examples of issues never reviewed by the appeals court in the earlier appeal of the underlying case.

Still further, appellants were not apprised of the consequences of dismissal when they missed what was

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[9] In accord, *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 298 (2d Cir. 2005) (finding that FRCP 55(c) "provid[es] that default judgments may be set aside in accordance with Rule 60(b)").

[10] See *Donald v. Cook County Sheriff's Dept.* 95 F.3d 548 (7th Cir. 1996)(Court of Appeals reversal upon District Court's abuse of discretion in denying a motion for relief without due consideration of issues raised in the motion, including whether the statute of limitations should be subject to equitable tolling.)

the initially called status conference in the case. Relief under Rule 60 is appropriate in such a situation.[11]

V. THE STRING-CITE OF CASES RELIED ON, WITHOUT DISCUSSION, BY THE DISTRICT COURT INVOLVE SUBSTANTIALLY DIFFERENT FACT SITUATIONS CLEARLY DIFFERENT AND DISTINGUISHABLE FROM THE PRESENT CASE.

In its short order denying the Rule 60 motion for relief, the district court held that the issue of whether a Rule 60 motion can be considered following an appeal has not been decided in the Fourth Circuit (shown herein to be incorrect, see *Tribble v. Bruin*, *supra*). In support of its action to not consider the Rule 60(b) motion, the district court cited four cases from other Circuits, yet none of them present Rule 60(b) motions under circumstances analogous to those of this present case and they are materially distinguishable. Given the word limit constraint of this Petition, suffice it to say that one major distinguishing ground in those cases is, for example, where the case went through a full trial with discovery and motions, and with the benefit of that flushing out of the merits of the case on a specific issue, an

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[11] See, e.g., *Hernandez v. Hernandez-Colon* 51 F.3d 264 (1st Cir. 1995); *Carter v. United States*, 780 F.2d 925 (11th Cir. 1986) (reversing den al of Rule 60(b) motion seeking relief from Rule 41(b) dismissal under similar circumstances.). Also, *Santiago v. Wood, 904 F.2d 673 (11th Cir. 1990)* where plaintiff missed a Rule 59(e) deadline after notice of the summary judgment order was delayed in the mail. The appellate court cited the resulting inequity as the basis for reversing the district court's denial of Rule 60(b) relief.

unsuccessful appeal followed. Then a Rule 60(b) motion was filed on the same issue, relying on the same evidence. Another difference is that unlike a hearing on a Rule 60(b) motion, an appeals court is limited to the record below, and does not apply the different standards of Rule 60(b). Plus, in the USDC's cited cases the movant often has delayed excessively in bringing its Rule 60 motion, such as for over two years as in *Bailey v. Tyan Stevedoring Col*, 894 F.2d 157, 159 (5th Cir. 1990) [one of the four non- 4th Circuit cases the USDC cited]. These cases are not at all analogous to the early termination, and imposition of sanctions, with jurisdiction lacking, as in the present case. The present case of this Petition presents an altogether different factual situation.

Appellant filed its motion to reconsider the very same day that it became aware of the missed hearing just the month earlier! It then followed up with a timely Rule 60 motion for relief.[12] This is often even viewed as commendable to the movant in demonstrating promptness and diligence, just as appellant showed in acting promptly in the underlying case to correct (1) a hearing he had not been aware of, and (2) the most extreme actions taken against both appellants (plaintiffs below) at that hearing,

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[12] Further holdings on Rule 60 being the proper vehicle for relief: *Harris v. United States*, No. 97 Civ.1904, 2004 WL 2297362 (S.D.N.Y. Oct. 12, 2004), cited by *Eubanks v. U.S.* Slip Copy, 2006 WL 2588093 (S.D.N.Y. 2006); *U.S. Energy Corp. v. Nukem, Inc.* 232 F.3d 903 (10th Cir. 2000) (filing of an earlier Rule 60(b) motion does not divest this court of jurisdiction to hear a subsequent Rule 60(b) motion); and *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

VI. THE DISTRICT COURT'S ORDER PRESENTS THE TYPE SITUATION TO WHICH RELIEF UNDER RULE 60(B) IS ESPECIALLY APPROPRIATE

On its face, the imposition of a $1.3 million is clearly unconscionable. The amount cannot be deemed as "fees" for none were shown, or asked for, in the record, nor stated as such in the order. As regards sanctions and discussed earlier, that is controlled under FRCP Rule 11. The one signed filing, the Complaint, was not faulted in the order. No Rule 11 sanction is therefore justified by the record of this case and, in fact, is forbidden by the statutory language and case law under Rule 11.[13]

Appellant has pointed to the contradictions of the district court's order in first finding no one had been served and therefore there was a lack of jurisdiction in the case. But then the district court proceeded to act as though there was jurisdiction. The dismissal of the case was based on nothing more than a statement that everything is barred by the statute of limitation, without making any fact determination (no evidence) for support. Causes of action in the Complaint were, in fact, timely filed. Medicare fraud under the federal statutes is one example, yet it was disregarded. These are but some examples of the facts and issues raised in the Rule 60 motion. They are not at all exhaustive.

Appellant emphasizes, however, that the issue in this Petition is not primarily the merits of the various issues raised by the motion, although they are an

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[13] See, discussion *supra* re *In Re Kunstler*.

inherent factor that cannot be ignored. Those issues are discussed herein to show the severe nature of the underlying district court's order and the meritorious relief appellants sought under Rule 60(b). The narrower issue is whether the district court acted properly in not looking at the Rule 60 motion at all. Its reason given (that the case had previously been appealed) is clearly at odds and contrary to the Rule 60 statute and case law decided thereunder. This error is all the more amplified when it is seen that the case was in its infancy – it did not get beyond the first status conference, and the Complaint as appellants' only signed pleading.

VII. THE LOWER COURTS' DECISIONS REPRESENT A SHARP DEVIATION FROM EXISTING LAW AND PRESENT A DANGEROUS PRECEDENT IF NOT REVERSED

The action of the USDC below essentially amounts to a re-writing of Rule 60 (improper legislation) to include a limitation that does not exist in the statute or in case law decided under that statute, namely, that any prior appeal bars any consideration of a Rule 60 motion. The underlying case's order as to (1) the amount of sanctions imposed – indeed, any sanctions being imposed under these facts --, (2) the lack of jurisdiction over un-served defendants, and (3) the absence of evidence to support dismissal on a Limitations ground, are all without precedent in the Fourth Circuit or elsewhere. Rule 60 is the correct procedure to address the inequity and injustice, and the district court's action in the present case defies the best purposes and intent of Rule 60. If the rulings in this case are left to stand, they would, no doubt, be

cited down the road, creating a host of new conflicts between the Circuits beyond the conflict that the present decision creates if it is to be left standing.

For the foregoing reasons, appellant's Petition should be Granted.

CONCLUSION

WHEREFORE, and for its relief, appellant prays in the alternative that:

1. This case be found suitable for a Summary Disposition by this Court. The short history in the filing of the Rule 60 motion and the District Court's short order in response thereto makes it decideable on these documents, which contain no complexing papers of discovery, testimony and the like. And on this review, that the case be reversed and remanded back to the U.S. District Court with instructions the district court's order of dismissal, and the appeal court's order affirming that dismissal be Vacated and the underlying case proceed with Discovery, or that the USDC order of App. B be vacated with instruction that appellant's Rule 60(b) motion be heard on its merits.

   alternatively,

2. That this Petition be Granted and proceed under a schedule as directed by the Court.

3. and/or for such further relief as this Court shall deem appropriate.

Respectfully submitted,

Michael J. Morrissey
10307 West Broad Street, #167
Richmond, Va. 23060
Tel: (804) 502-4468

APPENDIX

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1281

[Filed September 29, 2008]

MICHAEL J. MORRISSEY; THE ESTATE OF DOROTHY L. MORRISSEY BY: MICHAEL J. MORRISSEY, Its Administrator,

Plaintiffs - Appellants,

v.

ROBERT LESNIAK; ASHLAND CONVALESCENT CENTER; GEORGE F. TIDEY; HANOVER COUNTY ADULT PROTECTIVE SERVICES; HANOVER COUNTY; UNKNOWN STAFF MEMBERS; ADMINISTRATOR, Ashland Convalescent Center; PATRICIA GERSHENOFF; SALLY MOON; GEORGE ELMORE; JOSEPH RAPASARDO; HENRICO COUNTY; L. A. HARRIS; BON SECOURS, INCORPORATED, trading as St. Mary's Hospital; CARRIE WEST; TERRY BETINO; JEAN TODD; ELIZABETH OXENHAM; S. J. SEIDLITZ;

A. WOOD; SHERYL L. HERNDON; ANN HONEYCUTT; HOWARD C. VICK; MICHAEL ROBERTSON; COMMONWEALTH OF VIRGINIA; VIRGINIA DEPARTMENT OF AGING; TERRY RAINEY; VIRGINIA DEPARTMENT OF HEALTH; ANNE PETERSON; VIRGINIA CENTER FOR QUALITY HEALTH CARE; VIRGINIA DEPARTMENT OF MEDICAL ASSISTANCE SERVICES; HENRICO COUNTY DEPARTMENT OF SOCIAL SERVICES; HENRICO COUNTY DEPARTMENT OF MENTAL HEALTH; MARTHA CALLOWAY; RICHARD GLOVER; CYNTHIA WOOD; JAMES L. GILMORE; HARRY CARRICO, Virginia Supreme Court Participating Member as of September 1997; RICHARD H. POFF, Virginia Supreme Court Participating Member as of September 1997; CAROLYN WHITE; CAPITOL AREA AGENCY ON AGING; SHAWN MAJETTE; PAUL IZZO; OFFICE OF THE ATTORNEY GENERAL; RICHARD ALDERMAN; JAMES MOORE; JOSEPH RAPPASADA; HEALTH OF VIRGINIA, INCORPORATED, trading as University Park Nursing Home; PATRICIA L. JONES; WILLIAM BIGGERS; C. BEATTY; VICTORIA GUTMAKER; SUSAN A. CLIFTON; MARY ANN PROFFITT; AL HARRIS; GREER JACKSON; L. NEIL STEVERSON; EDWIN BISCHOFF; R. R. BROOKS; REBECCA ANDREWS; MICHELLE GAVIN, a/k/a Assistant Student; GAYLE CLENDENIN; PETER BOLING; MEDICAL COLLEGE OF VIRGINIA; VIRGINIA COMMONWEALTH

UNIVERSITY; UNKNOWN DOCTOR; MCV PHYSICIANS, a/k/a MCV Associated Physicians,

Defendants - Appellees,

v.

REED SMITH LLP,

Movant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. James R. Spencer, Chief District Judge. (3:06-cv-00034-JRS)

Submitted: September 10, 2008
Decided: September 29, 2008

Before WILKINSON and MOTZ, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Michael J. Morrissey, Appellant Pro Se. William Fisher Etherington, Leslie A. Winneberger, BEALE, BALFOUR, DAVIDSON & ETHERINGTON, PC, Richmond, Virginia; Robert A. Dybing, THOMPSON & MCMULLAN, Richmond, Virginia; Paul Kugelman, Jr., OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia; Jeremy David Capps, David Patrick Corrigan, HARMAN, CLAYTOR, CORRIGAN & WELLMAN, Richmond, Virginia; Rodney Kyle Adams, Tracy Taylor Hague, LECLAIR RYAN, PC, Richmond, Virginia; Dana Alexine Dews,

Elizabeth Griffin Robertson, GOODMAN, ALLEN & FILETTI, Glen Allen, Virginia; Robert Jacques Kloeti, FLORANCE, GORDON & BROWN, Richmond, Virginia; Richard Cyril Sullivan, Jr., REED SMITH, LLP, Falls Church, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Michael J. Morrissey appeals the district court's order denying his motions for reconsideration. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. Morrissey v. Lesniak, No. 3:06-cv-00034-JRS (E.D. Va. Jan. 29, 2008). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

Action No. 3 :06-CV-34

[Filed January 29, 2008]

ESTATE OF DOROTHY L. MORRISSEY, et al.,	)
Plaintiffs,	)
v.	)
ROBERT LESNIAK., et al., Defendants.	)

FINAL ORDER

THIS MATTER is before the Court on two Rule 60 Motions for Relief from Judgment (Docket Nos. 82 and 95) by the Estate of Dorothy L. Morrissey.

Michael J. Morrissey, the administrator of the Estate of Dorothy L. Morrissey, filed this suit on behalf of his deceased mother against approximately fifty defendants, alleging more than a dozen statutory and common-law causes of action arising from the defendants' alleged mistreatment of his mother. Judge

Leonard D. Wexler dismissed Morrissey's suit with prejudice on June 7, 2006. Morrissey filed two post-judgment motions, which were denied on August 15, 2006. Morrissey appealed those rulings to the Fourth Circuit Court of Appeals, which denied his appeals on January 31, 2007. Then, on June 4, 2007, Morrissey filed a Motion for Relief from Judgment under Federal Rule of Civil Procedure 60. On June 21, 2007, the case was transferred to the undersigned judge, and on August 14, 2007, Morrissey filed a second Rule 60 motion. The Court stayed this matter while Morrissey filed a petition for a writ of certiorari with the United States Supreme Court. His petition was denied on October 1, 2007, and he notified the Court on January 17, 2008 that his petition for rehearing was denied.

Under Federal Rule of Civil Procedure 60(b), a court may grant relief from a final order for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

But, several circuits have held that a district court may not consider a Rule 60 motion that deals with matters that were included, or could have been included, in a party's prior appeal of the case. See Eutectic Corp. v. Metco, Inc., 597 F.2d 32, 34 (2d. Cir. 1979) ("The court of appeals' rulings are the law of the case, and the district court is bound to follow them; it has no jurisdiction to review or alter them."); Seese v. Volkswagenwerk, A.G., 679 F.2d 336, 337 & n.1 (3d Cir. 1982) ("[T]he basis of the Rule 60(b)(6) motion was before this court and the Supreme Court, and thus could not be considered by the district court."); Bailey v. Ryan Stevedoring Co., 894 F.2d 157, 159 (5th Cir. 1990) (prohibiting a party from asking "the district court to rule again on the very issues decided on appeal"). See also Tapco Prods. Co. v. Van Mark Prods. Corp., 466 F.2d 109, 110 (6th Cir. 1972) (ruling that a district court lacked jurisdiction to modify or change a court of appeals' mandate).

While the Fourth Circuit has not decided this issue, the Court is persuaded by the reasoning of the circuits that have addressed the question. Once an appellate court has resolved a dispute, a lower court that is bound by the appellate court's decision may not re-examine it. Both of the Motions that are before the Court pertain to the rulings by Judge Wexler that were the subject of Morrissey's appeals to the Fourth Circuit (and his petition for a writ of certiorari to the United States Supreme Court). Thus, all of the issues raised by those Motions were appealed, or could have been appealed, to the Fourth Circuit. Applying the rule established by several other circuits, the Court lacks jurisdiction to decide those questions. Accordingly, both Motions are DISMISSED WITH PREJUDICE.

Let the Clerk send a copy of this Final Order to Morrissey and all counsel of record.

It is SO ORDERED.

/s/ James R. Spencer
CHIEF UNITED STATES DISTRICT JUDGE

ENTERED this 28th day of January 2008

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

Case No. 3:06-cv034

[Filed August 15, 2006]

The Estate of Dorothy L. Morrissey By: Michael J. Morrissey, Its Administrator, *et al.*	)
Plaintiff,	)
v.	)
Robert Lesniak, *et al.*,	)
Defendants.	)

ORDER

Upon the plaintiff's Motion to Stay, Vacate and Reinstate, and upon the appearance arguments of counsel and Michael J. Morrissey, personally and for the Estate of Dorothy L. Morrissey, the Court hereby **ORDERS** that the Motions are **OVERRULED** and denies the relief sought in Plaintiff's Motion.

The Clerk is ORDERED to mail authenticated copies of the order to all counsel of record and unrepresented parties.

ENTER: 8/15/06
/s/
Hon. Leonard D. Wexler
USDJ

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

Case No. 3:06-cv034

[Filed June 7, 2006]

The Estate of Dorothy L. Morrissey By: Michael J. Morrissey, Its Administrator, *et al.*	)
Plaintiff,	)
v.	)
Robert Lesniak, *et al.*,	)
Defendants.	)

ORDER

Pursuant to the Order of the Court dated May 2, 2006, whereupon a hearing was set on the various Motions of the defendants, including dispositive motions, motions for sanctions, and motions to deem said motions unopposed, and

Whereupon the Court finding that the plaintiff, Michael J. Morrissey, and the Estate of Dorothy L.

Morrissey by Michael J. Morrissey ("Plaintiffs"), having failed to file responses to said dispositive motions, and further having failed to have filed the actions consolidated under this case number ("the cases") within the appropriate statute of limitations, having failed to timely serve the defendants, having failed to comply with the Order of the United States District Court, Eastern District of Virginia, Norfolk Division, regarding the filings of proofs of service on or before November 30, 2005, and having been properly notified of said hearing by mailing of a copy of the May 2, 2006 Order from counsel as well as from the Clerk's Office of the United States District Court, Eastern District of Virginia, Arlington Division, and further having failed to appear to make argument on any of the above, the Court finds it proper to dismiss with prejudice the cases.

Furthermore, upon the motions for sanctions previously filed and accompanied by memoranda of law, the Court finds that the conduct of the plaintiffs in this matter is egregious, vexatious and designed merely for the purpose of harassing and causing expense and inconvenience to the various defendants.

Furthermore, it is apparent to the Court that these matters have been dispositively resolved adversely to the plaintiff in a number of sister and state jurisdictions, including the Western District of Virginia, Charlottesville Division, the Eastern District of Virginia, Richmond Division, the Circuit Court for the City of Richmond, the Circuit Court for the County of Henrico, the Circuit Court for the County of Hanover, as well as the Virginia Supreme Court.

Furthermore, upon the arguments of counsel as well as the briefs filed, it is apparent that the plaintiff owes tens of thousands of dollars in unpaid sanctions, none of which have proven effective deterrents against frivolously filing additional actions under the same set of facts. Additionally, the Court has found that these plaintiffs have been barred from filing additional claims against these defendants in a number of Courts, a bar which the plaintiffs have flouted time and again.

Wherefore, this Court rules as follows:

1. That the cases consolidated as 3:06cv034 are hereby dismissed with prejudice. Furthermore, with regard to the claims raised in those actions and the defendants against whom they are brought, plaintiffs are barred from bringing any further actions in any United States District Court for any state of territory of the United States absent prior consent following a personal appearance this Court or a sister Court of this District and Division. Furthermore, the plaintiffs must provide any court he petitions for leave to file with a copy of this order and of the complaints filed in this matter. Plaintiff's must then show cause why said actions may be properly brought, why they are not barred by the statute of limitations and why they are not barred by *res judicata* or collateral estoppel. Finally, it being apparent that no previous sanctions have impressed upon the plaintiffs to the gravity of their misconduct in these matters, the plaintiffs are hereby ORDERED to pay sanctions in this action in the amount of $10,000.00 per named defendant.

The Court will treat any violation of any provision of this Order as contempt of court and will apply the

appropriate sanction against the plaintiff, including but not limited to, incarceration for a period of time commensurate with the level of the violation.

By Order of this Court, this matter is hereby dismissed, and the endorsement of counsel are hereby waived. Counsel for the defendants are further instructed to confirm receipt of this Order by the plaintiffs either by service of process or by certified mailing. There being no further matters in these cases, the Clerk is ORDERED to strike the action from the docket and to mail authenticated copies of the order to all counsel of record.

ENTER: 5/30/06

/s/
Hon. Leonard D. Wexler USDJ

Signatures waived by agreement of counsel.

Michael J. Morrissey
2762 Granada Place
Lawrenceville, GA 30044

Michael Morrisey
2112 Oakwood Lane
Richmond, VA 23228

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 08-1281
(3:06-cv-00034-JRS)

[Filed November 18, 2008]

MICHAEL J. MORRISSEY; THE ESTATE OF DOROTHY L. MORRISSEY BY: MICHAEL J. MORRISSEY, Its Administrator,

Plaintiffs - Appellants,

v.

ROBERT LESNIAK; ASHLAND CONVALESCENT CENTER; GEORGE F. TIDEY; HANOVER COUNTY ADULT PROTECTIVE SERVICES; HANOVER COUNTY; UNKNOWN STAFF MEMBERS; ADMINISTRATOR, Ashland Convalescent Center; PATRICIA GERSHENOFF; SALLY MOON; GEORGE ELMORE; JOSEPH RAPASARDO; HENRICO COUNTY; L. A. HARRIS; BON SECOURS, INCORPORATED, trading as St. Mary's Hospital; CARRIE WEST; TERRY BETINO; JEAN TODD; ELIZABETH OXENHAM; S. J. SEIDLITZ; A. WOOD; SHERYL L. HERNDON; ANN

HONEYCUTT; HOWARD C. VICK;)
MICHAEL ROBERTSON; COMMONWEALTH)
OF VIRGINIA; VIRGINIA DEPARTMENT)
OF AGING; TERRY RAINEY; VIRGINIA)
DEPARTMENT OF HEALTH; ANNE)
PETERSON; VIRGINIA CENTER FOR)
QUALITY HEALTH CARE; VIRGINIA)
DEPARTMENT OF MEDICAL ASSISTANCE)
SERVICES; HENRICO COUNTY)
DEPARTMENT OF SOCIAL SERVICES;)
HENRICO COUNTY DEPARTMENT OF)
MENTAL HEALTH; MARTHA CALLOWAY;)
RICHARD GLOVER; CYNTHIA WOOD;)
JAMES L. GILMORE; HARRY CARRICO,)
Virginia Supreme Court Participating Member)
as of September 1997; RICHARD H. POFF,)
Virginia Supreme Court Participating Member)
as of September 1997; CAROLYN WHITE;)
CAPITOL AREA AGENCY ON AGING;)
SHAWN MAJETTE; PAUL IZZO; OFFICE)
OF THE ATTORNEY GENERAL; RICHARD)
ALDERMAN; JAMES MOORE; JOSEPH)
RAPPASADA; HEALTH OF VIRGINIA,)
INCORPORATED, trading as University Park)
Nursing Home; PATRICIA L. JONES;)
WILLIAM BIGGERS; C. BEATTY; VICTORIA)
GUTMAKER; SUSAN A. CLIFTON; MARY)
ANN PROFFITT; AL HARRIS; GREER)
JACKSON; L. NEIL STEVERSON; EDWIN)
BISCHOFF; R. R. BROOKS; REBECCA)
ANDREWS; MICHELLE GAVIN, a/k/a)
Assistant Student; GAYLE CLENDENIN;)
PETER BOLING; MEDICAL COLLEGE)
OF VIRGINIA; VIRGINIA COMMONWEALTH)

UNIVERSITY; UNKNOWN DOCTOR; MCV PHYSICIANS, a/k/a MCV Associated Physicians,

Defendants - Appellees,

v.

REED SMITH LLP,

Movant - Appellee.

ORDER

The petition for rehearing en banc was circulated to the full Court. No poll was requested. The Court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 08-1281
(3:06-cv-00034-JRS)

[Filed November 18, 2008]

MICHAEL J. MORRISSEY; THE ESTATE OF DOROTHY L. MORRISSEY BY: MICHAEL J. MORRISSEY, Its Administrator,

Plaintiffs - Appellants,

v.

ROBERT LESNIAK; ASHLAND CONVALESCENT CENTER; GEORGE F. TIDEY; HANOVER COUNTY ADULT PROTECTIVE SERVICES; HANOVER COUNTY; UNKNOWN STAFF MEMBERS; ADMINISTRATOR, Ashland Convalescent Center; PATRICIA GERSHENOFF; SALLY MOON; GEORGE ELMORE; JOSEPH RAPASARDO; HENRICO COUNTY; L. A. HARRIS; BON SECOURS, INCORPORATED, trading as St. Mary's Hospital; CARRIE WEST; TERRY BETINO; JEAN TODD; ELIZABETH OXENHAM; S. J. SEIDLITZ; A. WOOD; SHERYL L. HERNDON; ANN

HONEYCUTT; HOWARD C. VICK;)
MICHAEL ROBERTSON; COMMONWEALTH)
OF VIRGINIA; VIRGINIA DEPARTMENT)
OF AGING; TERRY RAINEY; VIRGINIA)
DEPARTMENT OF HEALTH; ANNE)
PETERSON; VIRGINIA CENTER FOR)
QUALITY HEALTH CARE; VIRGINIA)
DEPARTMENT OF MEDICAL ASSISTANCE)
SERVICES; HENRICO COUNTY)
DEPARTMENT OF SOCIAL SERVICES;)
HENRICO COUNTY DEPARTMENT OF)
MENTAL HEALTH; MARTHA CALLOWAY;)
RICHARD GLOVER; CYNTHIA WOOD;)
JAMES L. GILMORE; HARRY CARRICO,)
Virginia Supreme Court Participating Member)
as of September 1997; RICHARD H. POFF,)
Virginia Supreme Court Participating Member)
as of September 1997; CAROLYN WHITE;)
CAPITOL AREA AGENCY ON AGING;)
SHAWN MAJETTE; PAUL IZZO; OFFICE)
OF THE ATTORNEY GENERAL; RICHARD)
ALDERMAN; JAMES MOORE; JOSEPH)
RAPPASADA; HEALTH OF VIRGINIA,)
INCORPORATED, trading as University Park)
Nursing Home; PATRICIA L. JONES;)
WILLIAM BIGGERS; C. BEATTY; VICTORIA)
GUTMAKER; SUSAN A. CLIFTON; MARY)
ANN PROFFITT; AL HARRIS; GREER)
JACKSON; L. NEIL STEVERSON; EDWIN)
BISCHOFF; R. R. BROOKS; REBECCA)
ANDREWS; MICHELLE GAVIN, a/k/a)
Assistant Student; GAYLE CLENDENIN;)
PETER BOLING; MEDICAL COLLEGE)
OF VIRGINIA; VIRGINIA COMMONWEALTH)

UNIVERSITY; UNKNOWN DOCTOR; MCV PHYSICIANS, a/k/a MCV Associated Physicians,

Defendants - Appellees,

v.

REED SMITH LLP,

Movant - Appellee.

MANDATE

The judgment of this Court, entered 9/29/08, takes effect today.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/ Patricia S. Connor, Clerk

APPENDIX G

Gmail
morrisseyinbox@gmail.com

08-1281 Michael Morrissey v. Robert Lesniak
"Mandate issued" Inbox
ecfnoticing@ca4.uscourts.gov to me
show details 11/26/06 Reply

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United States Court of Appeals
for the Fourth Circuit

Notice of Docket Activity

The following transaction was entered on 11/26/2008 at 7:16:23 AM EST and filed on 11/26/2008

Case Name: Michael Morrissey v. Robert Lesniak
Case Number: 08-1281
Document(s): Document(s)

Docket Text:

Mandate Issued. Referencing: [997944944-2], judgment Order, [997944935-3], Opinion, Originating case number: 3:06-cv-00034-JRS [08-1281] (DSD)

The following document(s) are associated with this transaction:

Document Description:

Original Filename: /opt/ACEF/live/forms/ddaniel_081281_997984861_MnadateAllCaseTypes_221.pdf

Electronic Document Stamp:
[STAMP acecfStamp_ID=1105645354 [Date=11/26/2008] [FileNumber=997984861-0] 98ea88614fe64992af9bcd9d5f5a6f5dda3aeb48e180e4c4e6a28f9f474b79f7bb7c8ed565961d5ae6c3b6a211dacded9b24f65f152493e950262c88d3854b31]]

Recipients:

- Mr. Adams, Rodney Kyle
- Mr. Capps, Jeremy David
- Mr. Corrigan, David Patrick
- Mr. Dybing, Robert A.
- Mr. Etherington, William Fisher
- Galindo, Fernando, Clerk of Court
- Hague, Tracy Taylor
- Mr. Kloeti, Robert Jacques
- Mr. Kugelman, Paul, Jr.
- Morrissey, Michael J.
- Robertson, Elizabeth Griffin, Attorney
- Mr. Sullivan, Richard Cyril, Jr.

- Winneberger, Leslie A., Attorney

Notice will be electronically mailed to:

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA HARRISONBURG DIVISION

Civil Action No. 5:06CV00005

[Filed February 8, 2006]

ESTATE OF DOROTHY L. MORRISSEY, and MICHAEL J. MORRISSEY,	)
Plaintiffs,	)
v.	)
ROCKINGHAM MEMORIAL HOSPITAL, DR. MCNETT, AVANTE NURSING HOME, COMMONWEALTH OF VIRGINIA, and GEORGE TIDEY	)
Defendants.	)

By: Hon. Glen E. Conrad
United States District Judge

ORDER

For the reasons stated in the accompanying Memorandum Opinion entered this day, it is now

ADJUDGED and ORDERED

as follows:

(1) The Estate of Dorothy L. Morrissey shall be and hereby is DISMISSED as a party plaintiff in this case;

(2) Plaintiff's complaint shall be and hereby is DISMISSED with prejudice as to the Commonwealth of Virginia and Judge Tidey;

(3) Counts I, II, III, and IV (the federal claims) shall be and hereby are DISMISSED as to the remaining defendants, Rockingham Memorial Hospital, Avante Nursing Home, and Dr. McNett, for failure to state a claim upon which relief can be granted;

(4) The court having declined to exercise supplemental subject matter jurisdiction under 18 U.S.C. § 1367, the remaining counts (the state claims) are DISMISSED without prejudice as to the remaining defendants.

(5) Inasmuch as there is no indication that the plaintiff has abused the processes of this court, the motion for sanctions shall be and hereby is DENIED. The defendants' motions for severance and transfer of venue are DISMISSED as moot; and

(6) All matters at issue in this case having been addressed, the case shall be and hereby is DISMISSED and stricken from the active docket of this court.

The Clerk is directed to send copies of this order to the plaintiff Michael Morrissey and all counsel of record.

ENTER this 7th day of February, 2006.

/s/ Glen E. Conrad
United States District Judge

A TRUE COPY TESTE:
JOHN F. CORCORAN CLERK
BY: /s/ DEPUTY CLERK